No. 14

In the Supreme Court of the United States

October Term, 1957

Joseph F. Black, Assistant Regional Commissioner, Alcohol and Tobacco Tax Division (Dallas Region), Internal Revenue Service, petitioner

v.

Magnolia Liquor Company, Inc.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONER

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v.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (R. 188–197) is reported at 231 F. 2d 941.

JURISDICTION

The judgment of the court of appeals (R. 197) was entered on April 6, 1956. The time for petitioning for a writ of certiorari was extended by Mr. Justice

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[1] The respondent in the court of appeals was Claud B. Cooper, petitioner's predecessor in office. By order of August 18, 1956 (R. 198–199), that court substituted petitioner for Mr. Cooper, *nunc pro tunc*, as of February 1, 1954.

Black, on July 2, 1956, to September 3, 1956 (R. 199-200). The petition for a writ of certiorari was filed on August 29, 1956, and was granted on October 22, 1956 (R. 200). 352 U. S. 877. The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether Sections 5 (a) and 5 (b) (7) of the Federal Alcohol Administration Act, which prohibit a wholesaler of alcoholic beverages from requiring or inducing any retailer to purchase such beverages "to the exclusion in whole or in part" of beverages offered for sale by other persons, prohibit tie-in sales by wholesalers.

STATUTE INVOLVED

Section 5 of the Federal Alcohol Administration Act, 49 Stat. 977, 27 U. S. C. 205, provides in pertinent part:

> UNFAIR COMPETITION AND UNLAWFUL PRACTICES
>
> It shall be unlawful for any person engaged in business as a distiller, brewer, rectifier, blender, or other producer, or as an importer or wholesaler, of distilled spirits, wine, or malt beverages, or as a bottler, or warehouseman and bottler, of distilled spirits, directly or indirectly or through an affiliate:
>
> (a) *Exclusive outlet.*
>
> To require, by agreement or otherwise, that any retailer engaged in the sale of distilled spirits, wine, or malt beverages, purchase any such products from such person to the exclusion in whole or in part of distilled spirits, wine, or malt beverages sold or offered for sale

by other persons in interstate or foreign commerce, if such requirement is made in the course of interstate or foreign commerce, or if such person engages in such practice to such an extent as substantially to restrain or prevent transactions in interstate or foreign commerce in any such products, or if the direct effect of such requirement is to prevent, deter, hinder, or restrict other persons from selling or offering for sale any such products to such retailer in interstate or foreign commerce; or

(b) *"Tied house."*

To induce through any of the following means, any retailer, engaged in the sale of distilled spirits, wine, or malt beverages, to purchase any such products from such person to the exclusion in whole or in part of distilled spirits, wine, or malt beverages sold or offered for sale by other persons in interstate or foreign commerce, if such inducement is made in the course of interstate or foreign commerce, or if such person engages in the practice of using such means, or any of them, to such an extent as substantially to restrain or prevent transactions in interstate or foreign commerce in any such products, or if the direct effect of such inducement is to prevent, deter, hinder, or restrict other persons from selling or offering for sale any such products to such retailer in interstate or foreign commerce: * * * or (7) by requiring the retailer to take and dispose of a certain quota of any of such products; * * *.

STATEMENT

In February 1952, the Assistant Regional Commissioner of the Alcohol and Tobacco Tax Division,

Internal Revenue Service (then known as the District Supervisor) issued an order (R. 2–5) directing respondent (a liquor wholesaler) to show cause why its wholesaler's basic permit should not be suspended for having made tie-in sales of alcoholic beverages between December 1, 1950 and March 31, 1951, in alleged willful violation of Sections 5 (a) and 5 (b) of the Federal Alcohol Administration Act.[2]

After hearing, the examiner found that respondent had violated the Act by making such tie-in sales, and recommended that its permit be suspended for 45 days. (R. 161–188). On appeal, the Director of the Division approved and affirmed (with certain modifications) the examiner's findings,[3] but reduced the period of suspension to 15 days (R. 138–156), and the Assistant Regional Commissioner issued an order suspending respondent's permit for that period (R.

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[2] Section 4 (e) of that Act authorizes the Secretary of the Treasury to suspend or revoke basic permits for willful violation of the Act. By Treasury Department orders and regulations, the Secretary has delegated his authority. Under the regulations (26 C. F. R., Part 200), suspension or revocation proceedings are decided initially by a hearing examiner. If the Assistant Regional Commissioner agrees with that decision, he enters an order in accordance therewith. If he disagrees, he may file a petition for review with the Director of the Alcohol and Tobacco Tax Division, who may affirm, modify or reverse the examiner's decision. (The respondent similarly has a right of appeal to the Director.) The Assistant Regional Commissioner then enters an order in conformity with the Director's decision.

[3] The order to show cause also charged, and the examiner found, that respondent had knowingly and willfully made false entries in certain of its records. The Director reversed this finding, on the ground that such errors had been negligent rather than intentional (R. 152–155).

129–137). The court of appeals set the order aside on the ground that tie-in sales are not prohibited by the Act.

The pertinent facts, as found by the examiner (R. 161–175) and approved by the Director (R. 138, 145, 156), are as follows:

Respondent is the exclusive wholesale distributor for Seagram's products in the New Orleans area (R. 144, 162). It does an annual business of approximately \$6,000,000 (of which \$2,750,000 is done between December 1 and March 31), and has 2500–2600 retail customers, actual or potential (R. 162).

Between December 1, 1950 and March 31, 1951 (the period covered by the complaint), Johnny Walker Scotch and Seagram's V. O. Whiskey were in short supply (R. 163, 164–165), Seagram's Ancient Bottle Gin was a poor seller but plentiful (R. 171), and Seagram's 7-Crown Whiskey likewise was plentiful (R. 164). In order to increase its sales of Seagram's Ancient Bottle Gin and 7-Crown, respondent "adopted and executed a policy" (R. 164) of compelling its retail customers to purchase these brands, which they did not desire, in order to obtain V. O. or Johnny Walker, which they "desired and needed" (R. 164–166). Respondent's tie-in sales "affected adversely" the sales of competing brands, and therefore "excluded, in whole or in part, distilled spirits * * * offered for sale by other persons in interstate commerce" (R. 172);[4] and those sales were made "to such

[4] Various retailers testified that respondent required them to purchase brands which they did not want in order to obtain

an extent as substantially to restrain or prevent transactions" in interstate or foreign commerce in distilled spirits (R. 174).

In holding that the Act does not prohibit tie-in sales, the court of appeals declared that, since the Act authorizes suspension or revocation of permits for violations, it is penal in nature and to be construed "strictly against the Government" (R. 195). The court also relied on the fact that the NRA Codes of Fair Competition for the alcoholic beverage industry did not prohibit tie-in sales; that the Act was adopted to close the regulatory gap which was created when the Code system was held unconstitutional; and that the House Committee Report on the Act stated that it "embodies in statutory form so much of the former code system as the committee now deems appropriate and within the constitutional power of Congress to enact" (R. 193). The court noted the Government's contention that, since 1946, the Treasury Department had construed the Act as forbidding tie-in sales, but found that contention unpersuasive because of a 1947 letter by the Secretary which, in proposing legislation that would specifically have outlawed tie-in sales, indicated that in 1946 the Department had had "doubt" whether violations of the Act could be established by showing tie-in sales (R. 191, 195–196). The court distinguished *Distilled Brands* v. *Dunigan*, 222 F. 2d 867, where the Court of Ap-

those they needed (*e. g.*, R. 20, 21, 23–24, 34, 40, 49–50, 61, 64); and that, absent respondent's requirement, they would not have taken any of the "tied product" (R. 41, 43, 47, 50) or would have bought a competitor's brand instead (R. 24, 61).

peals for the Second Circuit had held that the Act does prohibit tie-in sales, on the ground that the 1947 letter of the Secretary had not been called to that court's attention (R. 196).[5]

SUMMARY OF ARGUMENT

The court of appeals held that, since the Federal Alcoholic Administration Act authorizes suspension, revocation or annulment of permits for willful violations, its substantive provisions are to be regarded as penal and therefore are to be strictly construed. But a proceeding to suspend the privilege of engaging in a business because of noncompliance with the applicable statutory standards is remedial rather than penal. *Helvering* v. *Mitchell,* 303 U. S. 391, 399. Moreover, regulatory legislation is not to be strictly construed merely because its violation "may be the basis of either civil proceedings of a preventative or remedial nature or of punitive proceedings, or perhaps both." *Securities & Exchange Comsion* v. *Joiner Corp.,* 320 U. S. 344, 353. A regulatory statute such as this "should be given hospitable scope" (*Keifer & Keifer* v. *Reconstruction Finance Corp.,* 306 U. S. 381, 391).

A. Section 5 (a) and 5 (b) (7) of the Act prohibit wholesalers of alcoholic beverages from requiring or inducing any retailer to purchaser their products "*to the exclusion* in whole or *in part* of [products] sold or offered for sale by other persons * * *" (emphasis added). A wholesaler who conditions the sale of wanted products upon the simultaneous purchase of

[5] In view of its decision on the statutory question, the court below found it unnecessary to reach other grounds for reversal urged by respondent (R. 196–197).

unwanted products "requires" or "induces" the retailer to purchase the latter, to the exclusion "in part" of products sold by other wholesalers. The record shows that respondent's tie-in sales have coerced buyers into accepting products which they would not otherwise have purchased, and have excluded other sellers of the tied product, *pro tanto,* from the market. See *Distilled Brands* v. *Dunigan,* 222 F. 2d 867, 869–870 (C. A. 2).

B. Section 5 of the Act, which contains the statutory provisions regulating "Unfair Competition and Unlawful Practices," was based in large measure upon the provisions of the prior NRA Codes of Fair Competition for the alcoholic beverage industry, which had prohibited various "unfair methods of competition." However, Congress did not merely reenact those of the code provisions which it "deem[ed] appropriate" (as the court of appeals apparently concluded), but made a number of important additions and changes which substantially broadened the code prohibitions against unfair competitive practices. In addition, the Act, for the first time, specifically injected into the regulatory scheme, as an essential element of violation, the competitive effect of the prohibited practices, namely, whether their effect was to exclude "in whole or in part" the products of competing sellers.

The legislative history shows that Congress intended to prohibit those practices "which tended to produce monopolistic control of retail outlets" (S. Rep. No. 1215, 74th Cong., 1st sess., p. 6), and to "prevent * * * monopolies and restraints of trade" in the liquor in-

dustry by striking at the causes "in their incipiency." (H. Rep. No. 1542, 74th Cong., 1st sess., p. 11). The restrictive practices condemned in Section 5 "are analogous to those prohibited by the antitrust laws." *Ib.*, p. 12. Tying arrangements are a classic example of practices "prohibited by the antitrust laws" which this Court repeatedly has condemned. *International Salt Co.* v. *United States*, 332 U. S. 392; *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131, 156–159.

"Tying agreements serve hardly any purpose beyond the suppression of competition. * * * Requirements contracts, on the other hand, may well be of economic advantage to buyers as well as to sellers, and thus indirectly of advantage to the consuming public." *Standard Oil Co.* v. *United States*, 337 U. S. 293, 305–306. Requirements contracts under which a retailer is required to purchase his entire supply of alcoholic beverages from a single wholesaler are specifically prohibited by Section 5 (a) of the Act. It would indeed be anomalous if Congress prohibited requirements contracts, which "may well be of economic advantage" to the public, while at the same time permitting wholesalers to use tie-in agreements, which have as their sole purpose "the suppression of competition."

C. Since at least 1946, the Treasury Department has construed Sections 5 (a) and 5 (b) (7) as prohibiting tie-in sales. This settled administrative construction by the agency which enforces the Act is entitled to great weight. The fact that in 1947 the Government sought clarifying legislation to make the Act explicitly applicable to tie-in sales neither lessens the weight to

which the settled construction is entitled, nor justifies any inference that the Act as written does not cover such sales.

ARGUMENT

SECTIONS 5 (a) AND 5 (b) (7) OF THE FEDERAL ALCOHOL ADMINISTRATION ACT PROHIBIT TIE-IN SALES OF ALCOHOLIC BEVERAGES BY WHOLESALERS TO RETAILERS

In holding that the Act does not prohibit tie-in sales, the court of appeals noted that the NRA Codes of Fair Competition for the alcoholic beverage industry had not outlawed such sales, and that the House Committee Report on the Act had stated that it "embodies in statutory form so much of the former code system as the committee now deems appropriate * * *." The court also rejected the settled administrative construction of the Act as covering tie-in sales, on the ground that the agency had expressed "doubt" as to the correctness of that interpretation. We shall show, however, that the specific language of Sections 5 (a) and 5 (b) (7), which the court did not consider, is broad enough to cover tie-in sales; that, contrary to the view of the court below, the Act substantially broadened the Code's regulatory provisions in a number of significant respects; that the legislative history of the Act reflects a Congressional purpose to prohibit restrictive practices in the alcoholic beverage industry which are "analogous to those prohibited by the antitrust laws" and "tended to produce monopolistic control of retail outlets"—a category which includes tie-in sales; and that the court of appeals failed to give proper weight to the settled administrative con-

struction of the Act by the agency charged with its enforcement.

Prior to discussing these issues, however, we think it important to point out what we believe to be a threshold error by the court below—one which improperly colored its entire approach to the problem of statutory construction here involved.

The court held that since the Act authorizes suspension, revocation or annulment of permits for willful violations, its substantive provisions are to be regarded as penal and therefore are to be strictly construed. But, contrary to the court's view that "[a] statute which authorizes the sanction of business cessation is indeed penal" (R. 195), it is well settled that a proceeding to suspend the privilege of engaging in a business because of non-compliance with the applicable statutory standards is remedial rather than penal. *Helvering* v. *Mitchell,* 303 U. S. 391, 399; *Cella* v. *United States,* 208 F. 2d 783, 789 (C. A. 7), certiorari denied, 347 U. S. 1016 (suspension of registration as livestock dealer); *Board of Trade of City of Chicago* v. *Wallace,* 67 F. 2d 402, 407 (C. A. 7), certiorari denied, 291 U. S. 680 (same); *Wright* v. *Securities & Exchange Commission,* 112 F. 2d 89, 94 (C. A. 2) (expulsion from stock exchange). Regulatory legislation is not to be strictly construed merely because its violation "may be the basis of * * * civil proceedings of a preventive or remedial nature * * *." *Securities & Exchange Commission* v. *Joiner Corp.,* 320 U. S. 344, 353. The correct rule is that the courts "will interpret the text so far as the meaning of the words

fairly permits so as to carry out in particular cases the generally expressed legislative policy." *Id.*, p. 351. A remedial statute such as this, which deals with "one of the most sensitive national problems" (*United States* v. *Hutcheson*, 312 U. S. 219, 235), "reveals a definite attitude on the part of Congress which should be given hospitable scope" (*Keifer & Keifer* v. *Reconstruction Finance Corp.*, 306 U. S. 381, 391).

The *Joiner* case answers respondent's further contention (Br. in Op., p. 13) that, since violation of Sections 5 (a) and 5 (b) may also involve possible criminal proceedings under Section 7 of the Act, the statute is "penal in its nature and should be strictly construed." The same argument was made and rejected in *Joiner*, where it was unsuccessfully "urged that we must interpret with strictness the scope of this Act [Securities Act of 1933] because violations of it are crimes," and "may be the basis of either civil * * * or of punitive proceedings, or perhaps both" (*Joiner* case, *supra*, 320 U. S. at p. 353).

In any event, the rule of strict construction does not require that legislation be given "the 'narrowest meaning.' It is sufficient if the words are given their fair meaning in accord with the evident intent of Congress." *United States* v. *Raynor*, 302 U. S. 540, 552; and see *United States* v. *Bramblett*, 348 U. S. 503, 509–510.

A. THE LANGUAGE OF SECTIONS 5 (a) AND 5 (b) (7) COVERS TIE-IN SALES, SINCE THEY RESULT IN "THE EXCLUSION * * * IN PART" OF PRODUCTS SOLD OR OFFERED FOR SALE BY OTHER PERSONS

Section 5 (a) of the Act makes it

> unlawful for any person engaged in business as a * * * wholesaler [of alcoholic beverages] * * * [t]o require, by agreement or otherwise, that any retailer * * * purchase any such products from such person *to the exclusion* in whole or *in part* of [products] sold or offered for sale by other persons * * *. [Emphasis added.]

Section 5 (b) (7) forbids a wholesaler

> [t]o induce * * * any retailer * * * to purchase any such products from such person *to the exclusion* in whole or *in part* of [products] sold or offered for sale by other persons * * * (7) by requiring the retailer to take and dispose of a certain quota of any of such products * * *. [Emphasis added.]

We submit that a wholesaler of alcoholic beverages who conditions the sale of wanted products upon the simultaneous purchase of unwanted ones "requires" the retailer to purchase the latter, to the exclusion "in part" of such products "sold or offered for sale by other" wholesalers, in violation of Section 5 (a). The "restraint" of such tie-in sales "on commerce is two-fold: The buyer is coerced into accepting a product which he would otherwise not have purchased; and other sellers of the tied-in products are to that extent excluded from the market." *Distilled Brands* v. *Dunigan,* 222 F. 2d 867, 869 (C. A. 2).

The record supports the finding that both coercion of buyers and exclusion of other sellers resulted from respondent's tie-in sales. Thus, a retailer testified that, if it had not been for such practices, he would not have purchased respondent's gin because "I had too much on hand already" (R. 41); another stated that the gin he had been compelled to buy on a tied basis was still on the shelves (R. 38). Two retail dealers testified that, had it not been for respondent's tie-in policy of requiring them to purchase its gin, they would have purchased gin sold by other wholesalers (R. 35, 61). Another testified that if respondent had not required him to buy Cinzano vermouth in order to obtain Johnny Walker Scotch, "I would have bought other vermouth that sell" (R. 24).

Similarly, respondent's tie-in sales required retailers "to take and dispose of a certain quota" of alcoholic beverages, in violation of Section 5 (b) (7). An example was a retailer who "couldn't get" a case of Johnny Walker for "a very good custo... r" "unless I bought a case of cordials" (R. 21); who, in order to obtain V. O., had to buy 7-Crown in the ratio of five cases of the latter to one of the former (R. 22); and who bought ten cases of Seagram's gin, a "very slow seller" which was not in demand in his trade, in order to obtain 25 cases of V. O. (*ibid.*).[6] By imposing such quotas upon retailers, respondent "induced" them to purchase alcoholic beverages to the exclusion of

[6] It was no less a "quota" because it was imposed as a condition to obtaining a different product, rather than as a condition to obtaining a particular product at all, *i. e.*, allowing a retailer to purchase a particular liquor only if he accepted a certain amount.

other brands which were offered for sale by respondent's competitors.

"Both subsections explicitly state that the forbidden practices need not result in complete exclusion of competitive sellers, but that partial interference will suffice." *Distilled Brands* case *supra*, at p. 869. The vice of a tie-in sale is that "[b]y conditioning his sale of one commodity on the purchase of another, a seller coerces the abdication of buyers' independent judgment as to the 'tied' product's merits and insulates it from the competitive stress of the open market." *Times-Picayune Company* v. *United States*, 345 U. S. 594, 605. The inevitable effect of respondent's tie-in sales was that competing wholesalers of the tied products, whose brands respondent's retail customers would have preferred to purchase if they had freedom of choice to do so, were precluded from competing for such business on an equal footing. Necessarily, such tie-in sales excluded "in part" the brand "sold or offered for sale" by the other wholesalers, within the meaning of Sections 5 (a) and 5 (b) (7).

B. THE LEGISLATIVE HISTORY AND BACKGROUND OF THE ACT SUPPORT THE VIEW THAT IT PROHIBITS TIE-IN SALES

While Congress retained in the Act those provisions of the NRA Codes of Fair Competition for the alcoholic beverage industry which it "deem[ed] appropriate," it also substantially broadened the Code provisions with respect to anti-competitive practices in a number of significant respects. Particularly, as we shall show, Congress intended to prohibit restrictive

practices in the industry "analogous to those prohibited by the antitrust laws," which "tended to produce monopolistic control of retail outlets." While the tie-in sale was not one of the particular restrictive practices upon which the Congress focused, we believe that it was the kind of anti-competitive practice which Congress intended to block in its "incipiency."

A brief description of the background of the Act will be helpful in showing its relationship to the codes, and the purpose which Congress sought to achieve by the provisions of Section 5.

When the Twenty-first Amendment, repealing Prohibition, became effective on December 5, 1933, Congress was not in session. Since existing legislation was inadequate to deal with the many regulatory problems posed by the newly revived industry, codes of fair competition, pursuant to the National Industrial Recovery Act, were quickly promulgated for all but one branch of the industry.[7] These codes, which attempted to meet "many" of the problems faced by the industry, were deemed to be of a "temporary character," since it was expected that Congress would shortly "enact appropriation legislation." H. Rep. No. 1542, 74th Cong., 1st sess., pp. 3-4; see Art I, Wholesalers Code, Revision 2, April 19, 1935. In fact, however, Congress did not pass legislation until August, 1935, three months after this Court invali-

[7] Codes were adopted for distillers on November 26, 1933; for importers on December 2, 1933; for brewers on December 4, 1933; for wholesalers and rectifiers on December 9, 1933; and for the wine industry on December 27, 1933. No code was ever prescribed for retailers.

dated the National Industrial Recovery Act in *Schechter Poultry Corp.* v. *United States*, 295 U. S. 495.

Article V of the Wholesalers Code, a typical code provision, contained a number of prohibitory provisions directed against "unfair methods of competition."[8] These provisions, insofar as they governed the relationship between wholesalers and retailers, were primarily addressed to unfair competitive practices affecting retailers who sell liquor for consumption on the premises. For example, the code provision regulating "Control of Retail Outlets" (Art. V, Sec. 8) make it an unfair practice for a wholesaler to "hold any interest in any license" to sell liquor "at retail for consumption on the premises," to "participate or engage in" such retail sales, to "control, employ, manage, or financially assist" an "on the premises" retailer, or, generally, to "hold any interest" in premises where such sales were made for immediate consumption. The Code also prohibited "Exclusive Outlets" (Art. V, Sec. 11), forbidding a wholesaler to "exact or require" any "trade buyer" selling "at retail for consumption on the premises" to "handle or sell only" the wholesaler's products. In the Distillers, Rectifiers and Wine Codes, the "Control of Retail Outlets" and "Exclusive Outlet" provisions were also limited to "on the premises" retailers. The Codes, however, did not prohibit wholesalers from controlling, or entering into exclusive dealing arrangements with, retailers who sold packaged goods for off-premises consumption.

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[8] Article V is set forth in Appendix A, *infra*, pp. 27–30.

Section 5 of the Act contains the statutory provisions regulating "Unfair Competition and Unlawful Practices." While these provisions are based in large measure upon the prior provisions of the Codes, Congress did not merely reenact those of the Code provisions which it "deem[ed] appropriate," as the court below apparently concluded. On the contrary, it made a number of important additions and changes which substantially broadened the prohibitions which the Codes contained.[9]

Thus, while the code provisions relating to "Exclusive Outlets" and "Control of Retail Outlets" applied only to "on the premises" retailers, Section 5 applies to all retailers, including those selling packaged goods. Furthermore, the Act, for the first time, specifically injected into the regulatory scheme, as an essential element of violation, the competitive effect of the prohibited practices. While the Code only prohibited a wholesaler from requiring a retailer to handle its products exclusively, Section 5 (a) of the Act prohibits a wholesaler from requiring a retailer to purchase alcoholic beverages from him "to the exclusion in whole *or in part* of [products] sold or offered for sale by other persons" (emphasis added). Similarly, Section 5 (b) (7), which had no counterpart in the Code, prohibits a wholesaler from "inducing" a retailer to purchase the wholesaler's products

[9] In some other respects, the Act is narrower than the Codes. For example, although the Brewers Code (Revision 1, August 1, 1934) contained detailed regulatory provisions for that industry, the only provisions of the Act applicable to brewers is Section 5, and that section applies to interstate sales only to the extent that intrastate sales are similarly regulated under state law.

where such purchase will exclude "in whole or in part" the products of other wholesalers. The same emphasis on the competitive effect of the practices occurs in Section 5 (c), which forbids commercial bribery, bonus payments and similar practices if they "induce * * * any trade buyer" to purchase a supplier's products "to the exclusion in whole or in part" of products sold by others; and in Section 8, which prohibits any person from holding interlocking directorates in two or more distillers, rectifiers or blenders unless he makes due showing that such interlocks "will not substantially restrain or prevent competition in interstate or foreign commerce in distilled spirits." [10]

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[10] The Act broadened the Code prohibitions in a number of other respects. For example, some of the Codes contained no prohibition on suppliers furnishing retailers with signs (*e. g.*, Distillers, Rectifiers, Importers); others permitted it up to an annual value of $100 (Wholesalers Code, Art. VI, Sec. 6 (d) (1); Wine Code, Art. V, Sec. 6 (d) (1); Brewers Code Art. IV, Sec. 6 (d)). Section 5 (b) (3) of the Act, however, prohibits wholesalers (and others) from furnishing retailers with signs unless authorized by Treasury Regulations. The latter permit the furnishing of signs of a value not exceeding $30.00 for distilled spirits, and not exceeding $10.00 for wine and malt beverages. 27 C. F. R. § 6.23, 623a.

Although the Codes prohibited wholesalers from making conditional sales of distilled spirits (*e. g.*, Wholesalers Code, Art. V, Sec. 4), Section 5 (d) of the Act extended this prohibition to make it also unlawful for the buyer to enter into conditional sales contracts.

The Code provisions relating to misbranding were primarily negative (Wholesalers Code, Art. V, Sec. 2). The Act, however, affirmatively requires disclosure on the label of "adequate information" as to the identity, quality and alcoholic content of the product (Sec. 5 (e)). Similarly, while the Codes merely prohibited the publication or dissemination of "any false advertisement" (Wholesalers Code, Art. V, Sec. 1), the Act prescribes affirmative standards for the advertising of alcoholic beverages (Sec. 5 (f)).

The reason for this Congressional emphasis upon the competitive impact of the prohibited practices is expressed in the legislative history. Congress intended, by Section 5, to prohibit those practices "which tended to produce monopolistic control of retail outlets" (S. Rep. No. 1215, 74th Cong., 1st sess., p. 6), and to "prevent * * * monopolies and restraints of trade" in the liquor industry by striking at their causes "in their incipiency." H. Rep. No. 1542, 74th Cong., 1st sess., p. 11. The restrictive practices condemned in Section 5 "are analogous to those prohibited by the antitrust laws." *Id.*, p. 12.

Tying arrangements are a classic example of practices "prohibited by the antitrust laws". This Court repeatedly has condemned them in a variety of situations. *International Salt Company* v. *United States*, 332 U. S. 392 (tying restrictions in leases); *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131, 156–159 (block-booking); *Mercoid Corp.* v. *Minneapolis-Honeywell Regulator Co.*, 320 U. S. 680 (licensing agreements). See, also, *Landis Machinery Co.* v. *Chaso Tool Co.*, 141 F. 2d 800 (C. A. 6), certiorari denied, 323 U. S. 720 (full line forcing).

"Tying agreements serve hardly any purpose beyond the suppression of competition. * * * Requirements contracts, on the other hand, may well be of economic advantage to buyers as well as to sellers, and thus indirectly of advantage to the consuming pub-

lic." *Standard Oil Co.* v. *United States*, 337 U. S. 293, 305–306. Concededly, requirements contracts under which a retailer is required to purchase his entire supply of alcoholic beverages from a single wholesaler are specifically prohibited by Section 5 (a) of the Act. It would be anomalous if Congress prohibited requirements contracts, which "may well be of economic advantage" to the public, while at the same time permitting wholesalers to use tie-in agreements whose sole purpose is "the suppression of competition." In a statute which provides for comprehensive and detailed control of virtually all aspects of the business, Congress cannot be deemed to have left such a loophole as that for which respondent contends.

Like the tie-in sales which were condemned as *per se* violations of Section 1 of the Sherman Act in *International Salt Co.* v. *United States*, 332 U. S. 392, 396, the tendency of respondent's tie-in sales "to accomplishment of monopoly seems obvious." And, as Congress stated, Section 5 was intended to prohibit those practices "which tended to produce monopolistic control of retail outlets." S. Rep. No. 1215, 74th Cong., 1st sess., p. 6. Furthermore, tie-in sales are an obvious step in the direction of exclusive outlets and tied houses, restrictive practices which Congress sought to block "in their incipiency." We submit that Congress plainly intended to cover tie-in agreements when it prohibited a wholesaler from requiring, or inducing,

a retailer to purchase distilled spirits "to the exclusion in whole or in part" of such products sold by its competitors.[11]

C. THE SETTLED ADMINISTRATIVE CONSTRUCTION OF THE ACT SUPPORTS THE VIEW THAT IT PROHIBITS TIE-IN SALES

Since at least 1946, the Treasury Department has construed Sections 5 (a) and 5 (b) as prohibiting tie-in sales (R. 5–8).[12] This settled administrative interpretation of the Act by the agency charged with its enforcement is, under established canons of statutory

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[11] In holding that Sections 5 (a) and 5 (b) of the Act do not cover tie-in sales, the court of appeals noted (R. 195) that these subsections contain the respective headings of "Exclusive outlet" and "Tied house," and that "[t]ie-in sales do not * * * come within the ban against exclusive outlets and tied houses." But such section headings, which have not been "the subject of special consideration by the legislature," deserve "little weight." *Hadden* v. *The Collector*, 5 Wall. 107, 110. They are "but a short-hand reference" to the general subject matter involved, and they are "not meant to take the place of the detailed provisions of the text." *Railroad Trainmen* v. *B. & O. R. Co.*, 331 U. S. 519, 528, 529. Where, as here, the "text is complicated and prolific, headings and titles can do no more than indicate the provisions in a most general manner * * * matters in the text which deviate from those falling within the general pattern are frequently unreflected in the headings and titles." *Ibid.*

[12] In that year, the Department, having concluded that tie-in sales violated the Act, instituted 146 proceedings (including one against respondent) to suspend or revoke wholesalers' basic permits for making such sales, all of which were settled by stipulation. Annual Report, Commissioner of Internal Revenue, Fiscal Year 1946, p. 45; *Id.*, fiscal year 1950, p. 51; see Appendix B, *infra*, p. 32. The lack of any administrative interpretation prior to that time is explained by the fact that tie-in sales in the liquor industry ordinarily do not become a serious problem except in times of scarcity. "During the period of war-time scarcities the practice of 'tie-in' sales grew up and flourished in the liquor industry." Appendix B, *infra*, p. 31.

(Footnote continued on next page)

construction, entitled to great weight,[13] "particularly when it is so eminently reasonable in the light of the over-all purposes of this regulatory statute." *Distilled Brands* v. *Dunigan*, 222 F. 2d 867, 870 (C. A. 2).

The court of appeals, however, found this administrative construction unpersuasive because of a 1947 letter by the Acting Secretary of the Treasury which, in proposing legislation that would have specifically outlawed tie-in sales, stated that the Department had settled proceedings instituted in 1946 against wholesalers charged with tie-in sales because of its "doubt" as to "whether violations of the statute could be established through the 'tie-in' sales" (R. 191).[14] As the letter shows, however, the Department's "doubt" was not as to the correctness of its interpretation, but as to whether, in the light of the contention of industry members that tie-in sales were not covered by the Act, the Act ultimately would be held to cover tie-in sales. Furthermore, in both his 1946 and 1947 reports to the

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The Alcohol Tax Division continued its program against tie-in sales in 1947. Annual Report, Commission of Internal Revenue, Fiscal Year 1947, p. 49. In 1950, the Division completed its investigation of post-war tie-in sales. *Id.*, Fiscal Year 1950, pp. 51–52. Further scarcities of alcoholic beverages developed at the time of the Korean emergency. In 1951, the Division moved informally against such practices (*id.*, Fiscal Year 1951, p. 60). In 1952, it instituted three administrative proceedings to suspend or revoke wholesalers' basic permits for engaging in tie-in sales: the instant case, the *Distilled Brands* case and a case that was settled by stipulation. *Id.*, Fiscal Year 1952, p. 16.

[13] *United States* v. *American Trucking Ass'ns.*, 310 U. S. 534, 549; *National Labor Relations Board* v. *Hearst Publications*, 322 U. S. 111, 131; *Unemployment Compensation Commission* v. *Aragon*, 329 U. S. 143, 153–154.

[14] The letter is set forth in Appendix B, *infra*, pp. 31–36.

Secretary of the Treasury, the Commissioner of Internal Revenue (under whose jurisdiction the Alcohol Tax Division operated) stated his view that the Act outlaws tie-in sales. Annual Report, Commissioner of Internal Revenue, Fiscal Year 1946, p. 45; *id.*, Fiscal Year 1947, p. 49.

The fact that the cases were settled by stipulation,[15] instead of proceeding to trial, does not indicate, as the court below stated (R. 196), that the Treasury Department "doubted" the correctness of the statutory theory upon which the cases were based. Settlement of administrative proceedings by stipulation, rather than by going through a protracted hearing, is a well established and desirable practice, which is specifically provided for in Section 5 (b) of the Administrative Procedure Act, 5 U. S. C. 1004. See, also, Davis, *Administrative Law,* (1951) pp. 152–155.

The fact that the Government sought clarifying legislation to make the Act explicitly applicable to tie-in sales neither lessens the weight to which the settled administrative interpretation is entitled, nor justifies any inference that the Act as written does not cover such sales. This Court has refused to "draw the inference * * * that an agency admits that it is acting upon a wrong construction by seeking ratifica-

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[15] The stipulation provided that proceedings against the respondent, charging violations of Sections 5 (a) and 5 (b) through tie-in sales (R. 7–8), would be dismissed on condition, *inter alia*, that respondent agreed "hereafter not to violate Sections 5 (a) and/or (b) of the Federal Alcohol Administration Act" (R. 9).

tion from Congress," and has refused to hold that "a request for and failure to get in a single session of Congress clarifying legislation on a genuinely debatable point of agency procedure admits weakness in the agency's contentions." *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, 47. No hearings were held on the Department's bill, or on similar bills subsequently introduced without Treasury support.[16] The simple introduction of a bill to amend a statute, without any further proceeding thereon,[17] "is without meaning for purposes of statutory interpretation" (*Order of Railway Conductors* v. *Swan*, 329 U. S. 520, 529), particularly where, as here, it was merely a "clarifying" amendment (*United States* v. *Turley*, 352 U. S. 407, 415, note 14).

The proposed legislation, moreover, was in no event inconsistent with the view that Sections 5 (a) and 5 (b) already prohibited tie-in sales between wholesalers and retailers. For in addition to clarifying the Act to make explicit the existing prohibition on such sales, the bills also would have extended the prohibition to tie-in sales between importers and distillers, on the one hand, and wholesalers on the other. See *infra*, p. 33. At present, the Act bans only tie-in sales between wholesalers and retailers.

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[16] H. R. 3248, 81st Cong., 1st sess., March 4, 1949; H. R. 7600, 82d Cong., 2d sess., April 25, 1952.

[17] The draft of the Treasury bill was referred to the Senate Committee on Finance. 93 Cong. Rec. 10,570. The other two bills were referred to the House Committee on Interstate and Foreign Commerce. 95 Cong. Rec. 1896; 98 Cong. Rec. 4446. No further proceedings were had on any of the bills.

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded to that court for further proceedings.

Respectfully submitted.

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AUGUST 1957.

APPENDIX A

Code of Fair Competition for the Alcoholic Beverage Wholesale Industry, as amended to April 19, 1935:

* * * * *

ARTICLE V—UNFAIR METHODS OF COMPETITION (EXCLUDING PRODUCTS OF THE BREWING INDUSTRY)

The following practices constitute unfair methods of competition and shall not be engaged in with respect to alcoholic beverages by any member of the industry. Such practices shall not apply to the distribution of the products of the brewing industry.

SECTION 1. *False Advertising.*—To publish or disseminate in any manner any false advertisement of any alcoholic beverage. An advertisement shall be deemed to be false if it is untrue in any particular, or if directly or by ambiguity, omission, or inference, it tends to create a misleading impression.

SEC. 2. *Misbranding.*—To sell or otherwise introduce into commerce any alcoholic beverages that are misbranded, unless the member of the industry can establish a guaranty valid under regulations prescribed by the Administration. Alcoholic beverages shall be deemed to be misbranded—

(a) *Food and Drugs Act Requirements.*—If they are misbranded within the meaning of the Federal Food and Drugs Act and the member of the industry cannot establish a guaranty valid under Section 9 of the said Act.

(b) *Standards of Fill.*—If their container is so made, formed, or filled as to mislead the purchaser, or its contents fall below the standard of fill prescribed by regulations of the Administration.

(c) *Standards of Identity.*—If they purport to be or are represented as alcoholic beverages for which a definition of identity has been prescribed by regulations of the Administration, and they fail to conform to the definition.

(d) *Standards of Quality.*—If they purport to be or are represented as alcoholic beverages for which standards of quality have been prescribed by regulations of the Administration, and (1) fail to state on the label, if so required by the regulations, their standard of quality in such terms as the regulations specify, or (2) fall below the standard stated on the label.

(e) *Label Requirements.*—If in package form and they fail to bear a label conforming to such requirements as the Administration may by regulation prescribe. Regulations for the purposes of this subsection shall be prescribed by the Administration but only after due notice and opportunity for hearing to the members of the industry.

SEC. 3. *Commercial Bribery.*—To give or permit to be given money or anything of substantial value for the purpose of influencing persons (a) to purchase alcoholic beverages of a particular brand or from a particular person, or (b) to refrain from purchasing from or dealing with particular persons.

SEC. 4. *Consignment.*—To enter into any agreement, except for export, for the shipment or delivery of alcoholic beverages on consignment, or to sell alcoholic beverages conditionally or with a privilege of return, or on any basis other than a bona fide outright sale, except pursuant to regulations prescribed by the Administration.

SEC. 5. *Advertising and distribution service.*—(a) To pay, credit, or otherwise compensate a trade buyer for any advertising, display, or distribution service furnished by a trade buyer for or on behalf of the member of the industry, or to furnish any advertising, display,

or distribution service to or on behalf of a trade buyer; except that this section shall not prevent members of the industry from—

(1) Advertising their products and in connection with the advertisement setting forth the names and addresses of wholesale and retail establishments where such products may be obtained; or

(2) Furnishing to trade buyers signs advertising only the industry member or his products.

(b) Payments and allowances for special advertising or distribution service rendered within thirty days from the effective date of this amendatory section pursuant to contracts on file with the Code Authority on the effective date of this amendatory section, and at the time of filing lawful under this Code and applicable State or other law, shall not be regarded as in violation of this amendatory section.

SEC. 6. *Guarantees Against Decline.*—To make or give to any purchaser of alcoholic beverages any guarantee or allowance in any form against or as a result of decline in the seller's price thereof; except pursuant to a contract made prior to the effective date of this Code.

SEC. 7. *Prizes and Premiums.*—To offer any prize, premium, gift, or other similar inducement to either a trade or consumer buyer.

SEC. 8. *Control of Retail Outlets.*—To hold any interest in any license for the sale of alcoholic beverages at retail for consumption on the premises; or, directly or indirectly, to participate or engage in the sale of alcoholic beverages at retail for consumption on the premises; or to control, employ, manage, or financially assist in any manner, any person engaging in the retail sale of alcoholic beverages for consumption on the premises; or to hold any interest in any premises on which alcoholic beverages are sold at retail for consumption on the premises, unless the holding of such interests is permitted

under regulations of the Administration or a statement thereof has been filed with the Administration and has not been disapproved by it; provided that this section shall not be held to prohibit the granting of the credits ordinarily extended by the industry with respect to the sale of alcoholic beverages.

SEC. 9. *Sales to Unauthorized Vendors.*—To sell or otherwise dispose of alcoholic beverages to any person not authorized by license, in full force and effect, to sell, manufacture, or distribute alcoholic beverages, if such a license is required of such person by any State law or political subdivision thereof; or to sell or otherwise dispose of alcoholic beverages to any member of an industry covered by any code under the Act pertaining to alcoholic beverages, if such member is engaged in business without a permit in full force and effect under such code and such a permit is required by the Code, provided, however, that such sales (or other disposition) shall not be deemed a violation of the Section if such sale or disposition was made in good faith by the member of the industry.

SEC. 10. *Violations of State Law.*—To transport or import alcoholic beverages into any State or political subdivision thereof for delivery, sale, or use therein in violation of the law of such State.

SEC. 11. *Exclusive Outlets.*—To exact or require, by contract, understanding, or otherwise, that any trade buyer, who is engaged in the sale of alcoholic beverages at retail for consumption on the premises, handle or sell only the products of a particular member of the industry.

APPENDIX B

AUG. 15, 1947.

SIR:

There is transmitted herewith a draft of a proposed bill, "To amend the Federal Alcohol Administration Act, as amended."

The proposed bill would: (1) amend section 5 (c) of the Federal Alcohol Administration Act (U. S. C., title 27, sec. 205 (c)) to make conditioning of the purchase of any distilled spirits, wine or malt beverages upon, or "tying in" such purchase with, the purchase of any other distilled spirits, wine or malt beverages an unlawful inducement under that subsection; and (2) amend section 4 (g) of that Act (U. S. C., title 27, sec. 204 (g)) to make more definite and certain the time for the automatic termination of basic permits in cases of transfer through acquisition of control of the permittee.

The first proposed amendment is designed to bring so-called "tie-in" sales within the prohibitions of the Act. During the period of wartime scarcities the practice of "tie-in" sales grew up and flourished in the liquor industry. Under this practice suppliers of liquor to trade buyers made the purchase of scarce items such as whiskey, especially the more popular brands of whiskey, conditional upon the purchase by such buyers of other distilled spirits or wines which were in more plentiful supply and for which there was less consumer demand. For example, a retail dealer or a wholesale dealer desiring to make a purchase of whiskey urgently needed in his business

would be required by the distiller or other supplier, as a condition of such purchase, to buy an equal or greater quantity of other distilled spirits or wines which he did not want and for which he had no market. Transactions of this nature made it necessary for the Department to determine whether such practices violated the provisions of the Federal Alcohol Administration Act, as amended, directed against unfair competition and unlawful practices. The Department reached the conclusion that such practices violated the provisions of sections 5 (a) and 5 (b) of the Act (U. S. C., title 27, secs. 205 (a) and 205 (b)) where the transactions were of a nature to affect interstate or foreign commerce. In the absence of a provision in the statute expressly dealing with "tie-in" sales, however, it was decided to institute proceedings for the revocation or suspension of the basic permits of suppliers instead of attempting criminal prosecutions. Such proceedings were instituted in numerous cases, with the result that many suppliers agreed in writing to discontinue such practices. This disposition of the cases was due to doubt on the part of the Department as to whether violations of the statute could be established through the "tie-in" sales. It was contended by members of the industry that "tie-in" sales were not within the purview of sections 5 (a) and 5 (b) and that those sections were designed to prevent the creation of exclusive outlets and tied-houses only. In view of the situation it is believed the Act should be so amended as definitely to vest the Department with authority to act in such cases. It is proposed to accomplish this result by adding at the end of section 5 (c) a new clause as follows:

"(c) by conditioning the purchase of any distilled spirits, wine, or malt beverages upon, or 'tying in' such purchase with, the purchase

of any other distilled spirits, wine, or malt beverages; or".

This proposed amendment has been tacked on to section 5 (c) of the Act for the reason that the prohibitions of this section, unlike those of sections 5 (a) and 5 (b), run to transactions with any "trade buyer", which term as defined in the Act includes both wholesale and retail dealers.

The second proposed amendment is deemed advisable on account of a ruling made by a Circuit Court of Appeals in *Mid-Valley Distilling Corporation* v. *Louis De Carlo, Acting Supervisor, Alcohol Tax Unit, District No. 3* (C. C. A., 3rd, No. 9232, filed April 29, 1947), involving the automatic termination of a basic permit. Section 4 (g) of the Federal Alcohol Administration Act (U. S. C., title 27, sec. 204 (g)), the pertinent provisions of which are hereinafter quoted, provides for the automatic termination of basic permits where there is transfer by operation of law or through acquisition of control of the permittee. This provision was so construed by the court as to continue in effect a basic permit where there had been successive transfers of control of the permittee through acquisition of stock ownership and an application for a new permit had been made within thirty days after each such change. This construction will defeat the purpose of the Act because under it a permit could be continued in existence indefinitely by the engineering of another change of control each time before the application covering the previous change could be considered and acted upon. Under such circumstances it would be very difficult, if not impossible, to prevent the permit from falling into the hands of bootleggers and other law violators. Under the ruling of the case cited above, and if other Circuit Courts of Appeal should follow that decision, the ad-

ministration of the permit system would be very seriously affected. In order to forestall such a situation the Department believes the provision should be amended to eliminate any question regarding its meaning.

> Section 4 (g) of the Act in pertinent part declares that
>
> "if transferred by operation of law or if actual or legal control of the permittee is acquired, directly or indirectly, whether by stock ownership or in any other manner, by any person, then such permit shall be automatically terminated at the expiration of thirty days thereafter: *Provided,* That if within such thirty-day period application for a new basic permit is made by the transferee or permittee, respectively, then the outstanding basic permit shall continue in effect until such application is finally acted on by the Secretary of the Treasury."

The purpose here was to have basic permits automatically terminate in cases of transfer by operation of law or through acquisition of control of the permittee at the expiration of thirty days after the transfer or change of control occurred, except that if the transferee or the permittee (in case of change of control) filed an application for a new basic permit within such thirty-day period then the old basic permit would continue in effect until final action was taken on *such application.*

The legislative history of section 4 (g) of the Act indicates that it was the intention of the Congress to provide for the continuance of the old permit in such cases for a limited time only, pending application for a new permit and action thereon. (1935) H. R. Rpt. No. 1542, 74th Cong., 1st Sess. 9–10. It was apparently not contemplated that the old permit should continue in effect indefinitely through succes-

sive transfers by operation of law or acquisitions of actual or legal control, merely if an application for a new permit were filed within thirty days after each such change. While such continued existence of the permit through successive transfers by operation of law may not be hazardous, the contrary is true in respect of successive acquisitions of actual or legal control of the permittee because this would afford a means to bootleggers and other law violators to evade the permit system. In view of the court ruling, and in order to avoid further controversy on the point, and, possibly, a serious impediment to effective administration of the permit system, it is believed that section 4 (g) should be so amended as to make the time of the termination of the permit in cases where actual or legal control of the permittee is acquired by stock ownership or other means more definite and certain. This may be done by adding at the end of section 4 (g) a new proviso as follows:

> "*Provided further,* That if during such thirty-day period or during the pendency of such application the actual or legal control of the permittee shall be acquired by stock ownership or in any other manner, then, notwithstanding the provisions of section 9 (b) of the Administrative Procedure Act (Public Law 404, Seventy-ninth Congress; 60 Stat. 242), the outstanding permit shall automatically terminate thereupon."

With respect to the phrase in the proposed proviso, "notwithstanding the provisions of section 9 (b) of the Administrative Procedure Act (Public Law 404, Seventy-ninth Congress; 60 Stat. 242)", section 9 (b) of the Administrative Procedure Act provides, in part, that in any case in which the licensee has, in accordance with agency rules, made timely and sufficient application for a renewal or a new license, no

license with reference to any activity of a continuing nature shall expire until such application shall have been finally determined by the agency. Section 12 of the Administrative Procedure Act provides that no subsequent legislation shall be held to supersede or modify the requirements of that Act except to the extent that such legislation shall do so expressly. In order to eliminate any question arising as to the application of section 9 (b) to the automatic termination of permits contemplated by the proposed amendment, express language has been included to remove any doubt in the matter.

It is the view of the Department that the proposed amendments will strengthen the Federal Alcohol Administration Act and enactment of the bill is recommended.

There is enclosed for your convenient reference a comparative type showing the changes in existing law made by the proposed bill. It is requested that you lay the proposed bill before the Senate. A similar bill has been transmitted to the Speaker of the House of Representatives.

The Department has been advised by the Bureau of the Budget that there is no objection to the submission of this proposed legislation to the Congress.

Very truly yours,

(Signed) A. L. M. Wiggins,
Acting Secretary of the Treasury.

The President of the Senate

AT: L: WCH:
KMcD: HAR: ma 5/8/47

[Identical letter sent to The Speaker of the House of Representatives]

U. S. GOVERNMENT PRINTING OFFICE: 1947